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of
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E1-7566

Of Counsel
Thomas L. Costa
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May 30, 2008

Mr. Troy Brady
Section of Environmental Analysis
United States Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

Re: STB Docket No. FD 35141
U.S. Rail Corporation, Petition for Waiver Under
49 CFR 1105.10(a)

Dear Mr. Brady:

I am responding on behalf of the Town of Brookhaven ("Brookhaven") to a letter dated April 29, 2008 ("April 29 Letter") sent to you by John D. Heffner ("Heffner"), counsel to U.S. Rail Corporation ("U.S. Rail").

Brookhaven respectfully submits this letter in reply to the April 29 Letter and in further opposition to U.S. Rail's request for waiver of the six-month advance notice requirement and maintains that such request is not consistent with the regulations and policies of the United States Surface Transportation Board ("STB") and its Section of Environmental Analysis ("SEA").

In its April 29 Letter, U.S. Rail complains that "[t]he overall tenor of Brookhaven's comments reveals its determination to derail this project at every turn." Brookhaven's close scrutiny of the environmental process and the proceedings before the Board under Finance Docket No. 35036 have been based upon its well-founded suspicions about the activities of U.S. Rail and its affiliates. The record in Finance Docket No. 35036 is rife with numerous misrepresentations by U.S. Rail and its affiliates to the Board. At every turn of this proceeding Brookhaven has sought to clarify the record and provide a true representation of the facts and law upon which U.S. Rail's actions should be judged.

I. U.S. Rail's Pattern of Misrepresentation Continues

Throughout these proceedings, U.S. Rail has engaged in a pattern of misrepresentation designed to relieve it of any obligations to comply with appropriate procedures. The most recent example of these misrepresentations is a letter sent to you by Heffner dated May 13, 2008 in which Heffner was forced to amend and retract his assertion in the April 29 Letter that claimed that the SEA had reached a consensus on an important aspect of the environmental review of this project. This retraction came after Victoria Ruston, the Chief of the SEA, was required to correct the record because U.S. Rail asserted that there was a consensus that an EA was required and SEA had indicated no determination with regard to the preparation of an EA or an EIS would be made until a point later in the review process.

Overall, the premise of U.S. Rail's April 29 Letter is rather straightforward: the Board will entertain and routinely grant a waiver of the six-month advance notice requirement where SEA believes an EA should be adequate for the circumstances presented. Conversely, U.S. Rail notes that where an EIS is contemplated or required, the applicant must adhere to the six-month requirement. U.S. Rail's April 29 Letter is based upon its incorrect assertion that only an EA would be required and for that reason a waiver of the six month rule was appropriate.

Since the SEA has not concluded that it will limit its review to an EA, U.S. Rail's argument and reliance on BNSF Railway Company-Construction and Operation Exemption- Merced County, CA, STB Finance Docket No. 34305 (served November 7, 2003) is similarly misplaced. In BNSF, it was determined that an EA was appropriate. In addition, the proposed rail line in BNSF was only 850 feet, as opposed to the 11,000 feet of rail contemplated here. Furthermore, the scope of the proposed excavation and construction in BNSF pales in comparison to U.S. Rail's plans here.

The amount of excavation required in BNSF was minimal as evidenced by the following excerpts from the EA conducted:

The only excavation that may occur for the project would be to create the foundations for the crossing gates at Santa Fe Road. . . . Consequently, it is very unlikely that the proposed project would penetrate into the groundwater system in the area.

BSNF, STB Finance Docket No. 34305 (served November 7, 2003), EA, at 22. Here, U.S. Rail's proposal requires the excavation of thousands of cubic yards of sand and material.

U.S. Rail's attempt to convince the SEA that both plans involve the type of "minor construction project that is appropriate for environmental review under an EA" is easily contradicted by a cursory view of the facts: thousands of cubic yards of sand and material have already been excavated from the Sills Road site without any environmental review whatsoever.

II. An EIS Should Be Required

Pursuant to 42 U.S.C. § 4332(c), NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." More specifically, STB regulations provide, "an EIS will normally be prepared for rail construction proposals." 49 C.F.R. § 1105.6(a). An applicant can seek to demonstrate that an EA is sufficient for rail construction by showing that the particular proposal is "not likely to have a significant impact on the environment." 49 C.F.R. § 1105.6(d). The applicant must also supply supporting information addressing the pertinent aspects of 49 C.F.R. § 1105.7(e). See 49 C.F.R. § 1105.6(d). "[W]hen considering the significance of a proposed actions' impact, the agency should consider the degree to which the effects on the quality of the human environment are likely to be highly controversial." National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997)(citing 40 C.F.R. § 1508.27).

In a recent STB proceeding, the SEA determined that an EIS was appropriate because "the effects of the proposed project on the quality of the human environment were likely to be highly controversial." Southwest Gulf Railroad Company-Construction and Operation Exemption STB Finance Docket No. 34284 (served January 28, 2004)("SGR"). In SGR, the proposed rail line was to be used to transport aggregates. The STB received many comments concerning the environmental impact caused by the excavation contemplated. In the instant case, the effects of the proposed projects on the environment have already caused a significant amount of controversy as evidenced by the numerous newspaper articles that have been written about this project. The controversy in question is also evidenced by the active participation of Brookhaven in all facets of the review and consideration of this project. Brookhaven's submissions to the STB to date highlight the community controversy and concern. See Exhibits "A" and "I" to our letter dated April 21, 2008.

Moreover, numerous agencies, organizations and individuals have expressed concern regarding the potential environmental harm that may result from U.S. Rail's activities at the site, including the New York State Department of Environmental Conservation ("DEC"), which has already issued summonses to the construction contractor at the property for mining without a permit. Furthermore, the Director of the Division of Environmental Protection for the Town of Brookhaven, John Turner has stated, in a related judicial proceeding, that if this project were submitted to his division for review, a positive declaration under the New York State Quality Review Act ("SEQRA") (the State counterpart of NEPA) would be required, mandating the preparation of an EIS. See Declaration of John Turner, annexed hereto at Exhibit "A." In sum, all factors suggest that the SEA should require a full EIS for this project.

III. U.S. Rail Has Not Described As Completely As Possible The Anticipated Environmental Effects of the Proposed Action

U.S. Rail maintains that it has complied with 49 C.F.R. § 1105.10(c)(2) by describing as completely as possible the anticipated environmental effects of the project in its letter dated March 26, 2008 ("March 26 Letter"). However, U.S. Rail failed to offer any rebuttal to Brookhaven's letter dated April 21, 2008 ("April 21 Letter"), which lists numerous

environmental concerns that are noticeably missing from U.S. Rail's waiver request. For example, U.S. Rail's March 26 Letter makes no mention of the fact that it plans on changing the grade of the entire project site approximately 12 to 13 feet. Certainly, U.S. Rail is aware that such a significant grade change will have an impact on the surrounding environment. U.S. Rail also failed to address other significant environmental impacts including that: 1) the project site was characterized by a "mixed deciduous forest" prior to being clear-cut; 2) the property is located within a "deep recharge area" as defined by state and local law; and 3) the Site is within a Hydrogeologically Sensitive Zone.

IV. The SEA Should Consider U.S. Rail's Prior Conduct In Deciding Whether To Grant This Request

U.S. Rail claims in the April 29 Letter that what has "transpired in the past is not relevant to whether or not the SEA's review of this project satisfies the requirements of NEPA." Such a self-serving statement is an affront to both the letter and spirit of the environmental review process. To ignore U.S. Rail's past activities would condone such conduct and completely ignore the applicable environmental review process. U.S. Rail is asking the SEA to completely overlook its several months of illegal construction and attendant environmental devastation.

A period of six months is appropriate not just to consider the future environmental impact of this highly controversial proposal and, as importantly, to determine the present environmental consequences resulting from the construction that U.S. Rail has already illegally undertaken at the Site.

CONCLUSION

In sum, Brookhaven respectfully requests that the SEA deny U.S. Rail's petition for waiver of the six month notice requirement due to its continued pattern of misrepresentation and its failure to describe as completely as possible the anticipated environmental effects of its proposal as required by 49 C.F.R. § 1105.10(c)(2).

Very truly yours,



Mark A. Cuthbertson

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SILLS ROAD REALTY, LLC, SUFFOLK &
SOUTHERN RAIL ROAD, LLC and
U.S. RAIL CORPORATION,

07-5007AG

Petitioners,

**DECLARATION OF
JOHN L. TURNER
IN OPPOSITION TO
PETITIONERS MOTION
FOR A PRELIMINARY
INJUNCTION**

v.

SURFACE TRANSPORTATION BOARD;
and THE UNITED STATES OF AMERICA,

Respondents.
-----X

John L. Turner, under penalty of perjury pursuant to 28 U.S.C. §1746, declares as follows:

1. I am the Director of the Division of Environmental Protection for the Town of Brookhaven ("Brookhaven"). I am fully familiar with the facts and circumstances set forth herein, except those set forth on information and belief.
2. I submit this Declaration in Opposition to Petitioners' motion for a preliminary injunction.
3. As the Director of the Division of Environmental Protection, I am responsible for the environmental review of land use projects that are proposed for Brookhaven Town. In Brookhaven we have comprehensive rules and regulations that govern environmental review for facilities such as those proposed for the property in question. In siting and regulating such facilities we are required to follow New York State Environmental Quality Review Act ("SEQRA") to review the environmental impacts of proposed development projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented.

4. After reviewing the plans that have been submitted for this site and inspecting the property in person, I am of the opinion that if this project were submitted to my division for a review, that a positive declaration under SEQRA would be required.

5. The need for a positive declaration stems from, among other things, the fact that this property is in a deep flow recharge zone and is ecologically part of the Long Island Pine Barrens and therefore development of the property may cause significant hydrological and ecological impacts.

6. When a positive declaration is required, an applicant is mandated to prepare an Environmental Impact Statement ("EIS"). The EIS is required to look at, among other things, the environmental setting, the resources and features of the property, the impacts of the proposed development, the strategies that can be implemented to mitigate those impacts, and reasonable alternatives to the sponsor's project, one alternative potentially being an assessment of alternative sites.

7. Overall, the EIS is required to detail the impacts the project would have on the natural resources on site and in the surrounding environment. Among the impacts that the EIS would examine are the effects of the proposal on water quality, wildlife, traffic, air pollution, noise pollution, the removal of soils. In this case, in particular, the removal of sand between the land surface and the water table which is the uppermost expression of the groundwater system as reflected by the upper glacial aquifer reduces a filtering capability of the soil and subsoil regarding water which is recharged into the aquifer.

8. Prior to the preparation of an EIS, a scoping session typically takes place with notice to the public. At that session, public input would be solicited as to the relevant topics that would be considered in the EIS.

9. The applicant would then prepare an EIS, which would include a description of the action, a description of the physical setting, a description of all the environmental resources,

a discussion of the impacts of the project on the environment, as well as strategies for mitigating these impacts. In the case of this property, due to the nature and scope of the project, many mitigation strategies might be considered.

10. Under SEQRA, as stated above, the EIS must also contain a discussion of alternatives to the project, including a "no action alternative" where the possibility of no development would take place. In addition to the no action alternative, the EIS would have to examine whether this project could be developed on another property in Brookhaven where it would have less of an impact upon the environment.

11. The draft EIS would be submitted to the Brookhaven planning staff for their review to ensure accuracy, adequacy of content and to ensure that all the issues raised in the public scoping session were addressed. If the EIS was deemed to be complete, a public hearing would be scheduled. At the public hearing interested parties would comment upon the EIS and further revisions to the EIS would likely be made. When and if the staff and the applicant agreed that all environmental impacts had been identified and sufficient mitigation measures could be employed, the SEQRA process would be closed and the Town would adopt a final environmental impact statement and adopt findings related thereto.

12. It should be noted that applicants often submit the most aggressive plan for its business enterprise, which does not take into account preservation of the natural environment. One of the many positive attributes of the SEQRA process is that it seeks to allow the use of land but requires that consideration of the environment be taken into account. In this case the applicant has submitted a plan that makes maximum use of the site and involves significant vegetation removal, grading, and mining to the Property. After the appropriate SEQRA review, it could be the case that ways are identified to allow the Petitioners to operate while reducing or minimizing environmental impacts through less grading and mining at the site and establishing greater buffer areas.

13. Based on my site visit and a review of the plans submitted by the Petitioners, there are a number of items I anticipate would be examined in an EIS. First, I believe the layout of the facility would be closely examined. The assigned staff people would inquire as to whether there were other alternative layouts of the site to minimize disturbance to the environment and thereby create layer buffer areas.

14. Another issue that would require close examination is the grading of the property and the mining of materials that takes place in connection therewith. There is a significant change of grade from the northern portion of the property as you go south to the middle of the property. Based on the plans it appears that the whole northern portion of the project would be lowered approximately ten feet.

15. During the SEQRA process, the applicant might be required to examine alternative ways to lay out the site so that less vegetation removal and grading would be required.

16. Another issue that would likely be examined during the SEQRA process is the impact of the traffic generated by the facilities' operations. The traffic generation and configuration of the site would be reviewed and traffic mitigation measures (e.g., reconfiguration of the site, requirement of road widening and turning lanes) might be required.

17. I have been advised by counsel that the purpose of the Declaration is to provide an overview of the SEQRA process and to provide illustrations of what types of mitigation measures might be required. As such I have not touched upon the many other facets of the project that might require further examination. Suffice it to say that a project of this size (28 acres) and intensity (11,000 square feet of rail trade and associated facilities and equipment) would entail an exhaustive review and assessment of the many environmental impacts and mitigation measures.

18. The SEQRA process always occurs before construction. In this way unacceptable environmental impacts that would be identified by the SEQRA process can be avoided before they occur.

19. I am advised by counsel that there is a possibility in this case that the SEQRA process would be preempted and that the federal environmental standards under NEPA would apply.

20. Upon information and belief the NEPA process is very similar to the SEQRA process outlined and has been described as follows:

The NEPA process consists of an evaluation of the environmental effects of a federal undertaking including its alternatives. There are three levels of analysis depending on whether or not an undertaking could significantly affect the environment. These three levels include: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement (EIS).

* * *

If the EA determines that the environmental consequences of a proposed federal undertaking may be significant, an EIS is prepared. An EIS is a more detailed evaluation of the proposed action and alternatives. The public, other federal agencies and outside parties may provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.

If a federal agency anticipates that an undertaking may significantly impact the environment, or if a project is environmentally controversial, a federal agency may choose to prepare an EIS without having to first prepare an EA.

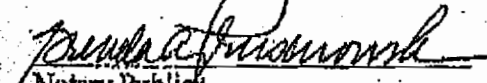
After a final EIS is prepared and at the time of its decision, a federal agency will prepare a public record of its decision addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process.

Source: United States Environmental Protection Agency web site,
<http://www.epa.gov/compliance/basics/nepa.html#requirement>

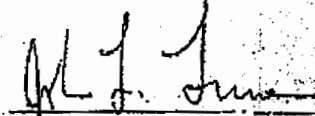
21. Presumably the same environmental issues would be identified in the NEPA process and provision would be made for similar mitigation measures. Brookhaven would participate in that process as an interested party and offer the comments noted above, which as noted above are illustrative of the issues involved and is by no means an exhaustive examination of the environmental concerns.

22. For the reasons set forth above, Petitioners request for a preliminary injunction should be denied.

Sworn to before me this
21st day of November, 2007


Notary Public

BRENDA A. PRUSINOWSKI
Notary Public, State of New York
No. 4884290, Suffolk County
Commission Expires 7/1/2011


John L. Turner



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

June X, 2008

John D. Heffner, Esq.
1750 K Street, NW
Suite 350
Washington, DC 20006

**Re: Finance Docket No. 35141, U.S. Rail Corporation Construction and
Operation of the Brookhaven Rail Terminal – Suffolk County, New York;
Waiver of Six-Month Prefiling Notice**

Dear Mr. Heffner:

Pursuant to 49 CFR 1105.10(c), we are granting your request of March 26, 2008, for waiver of the six-month prefiling notice generally required for construction projects under 49 CFR 1105.10 (a)(1).

On March 17, 2007, the Surface Transportation Board's Section of Environmental Analysis (SEA) met and consulted with representatives of U.S. Rail Corporation (U.S. Rail) regarding the potential environmental impacts associated with the construction and operation of 11,000 feet of new rail line in Suffolk County, NY. Also attending this meeting were representatives of Sills Road Realty, LLC (Sills Road). The representatives of U.S. Rail and Sills Road explained that, if approved, U.S. Rail would construct and operate over the new rail line for the sole purpose of transporting stone aggregate to a proposed new rail served facility, Brookhaven Rail Terminal (BRT) that would be owned and operated by Sills Road. The proposed new rail line, as well as the BRT, would be constructed on a 28 acre parcel that is located within the Town of Brookhaven's North Belleport Empire Development Zone and owned by Sills Road.

If approved, the BRT would be used to receive between 5,000 and 6,000 carloads of aggregate stone, in bulk or as gabions, annually for use by Sills Road in their current construction related activities.¹ This rail service would utilize one train making a single daily roundtrip, of 40 carloads per trip. U.S. Rail and Sills Road have also indicated that the BRT may also be used for the temporary storage of intermodal containers.

¹ Gabions are wire mesh baskets containing stone aggregate that are typically used to stabilize against erosion or in the construction of retaining walls, temporary flood walls, to filter silt from runoff, and for use as small or temporary dams.

SEA has also learned that the proposed BRT would not be constructed 'but for' the proposed new rail line. Therefore, the proposed BRT will also be considered as part of any environmental review since the traffic and related impacts of the BRT would not occur 'but for' the proposed rail construction and operation activities that are subject to the Board's regulatory control. Under the National Environmental Protection Act (NEPA), and the Council of Environmental Quality (CEQ) guidelines, matters that fall outside the Board's regulatory control must be considered to the extent that they are a direct consequence of actions, such as the construction and operation of a rail line, that are within the Board's regulatory control.

Sills Road currently receives shipments of stone aggregate materials that originate from quarries near Saratoga Springs, NY, and are served by CP Rail. CP Rail transports the stone aggregate materials to Long Island, NY, via CSX Transportation's Hudson Line and then interchanges with New York & Atlantic Railway (NY&A) at the Fresh Ponds Rail Yard. Currently, rail shipments of stone aggregate materials are delivered to a facility leased by Sills Road. However, Sills Road has indicated that the lease has not been renewed. If the BRT is approved, U.S. Rail anticipates that once inbound deliveries have arrived, NY&A would interchange with U.S. Rail who would then transport the rail cars into the BRT for unloading. Following the unloading procedure, U.S. Rail would then reassemble the empty rail cars for interchange back to the NY&A.

Background

In addition to providing preliminary information regarding the proposed BRT, representatives of U.S. Rail and Sills Road also provided additional environmental information related to a previously prepared environmental review of this very same 28 acre parcel. On August 14, 2002, Brookhaven Energy Limited Partnership (BELP) obtained a Certificate of Environmental Compatibility and Public Need from the New York Board on Electric Generation, Siting, and the Environment (NY Board) to construct and operate a 580 Mega Watt combined-cycle power generation facility.^{2 3} However, the power plant was never constructed. Nonetheless, the results of this environmental review found the following: 1) there are no residential parcels or community services within 2,000 feet and only 13 residences within one-half mile radius; 2) there are no surface waters or jurisdictional wetlands within the site; 3) there are no federally listed threatened or endangered animal or plant species; and 4) that Phase 1A and 1B archeological surveys have been conducted and no non-modern artifacts were discovered. Furthermore, on April 1, 2003, the NY Board, reaffirmed their earlier decision granting approval for construction of the Brookhaven Energy Project. The NY Board also found "In sum, we have evaluated the probable environmental impacts associated with Brookhaven's proposal and the design modifications... and we find that the modified facility will minimize adverse environmental impacts as required by PSL 168(2)."

2 Brookhaven Energy Limited Partnership planned to construct the power plant in connection with a solicitation by Long Island Power Authority (LIPA) for energy resources. Caithness Energy was also a bidder in the LIPA solicitation. Caithness Energy won the bid and entered into a long-term power contract with LIPA and is currently constructing the plant south of U.S. Rail's proposed rail line construction. Therefore, BELP decided to sell the property rather than build a "merchant" power plant that would not have the benefit of a LIPA power purchase agreement.

3 The U.S. Environmental Protection Agency issued a new Prevention of Significant Deterioration of Air Quality (PSD) Permit for the Brookhaven Energy Project on August 26, 2002.

On April 21, 2008, the City of Brookhaven (City) submitted a letter requesting that SEA deny U.S. Rail's request for a waiver from the six-month prefilng requirement. In its submittal, the City makes the following assertions: 1) U.S. Rail has not fully described potential environmental impacts; 2) the potential environmental impacts associated with the BELP are significantly different from those that would result from the construction of the BRT; 3) U.S. Rail should be closely scrutinized because of prior conduct; 4) U.S. Rail does not intend to construct and operate the BRT but is seeking federal preemption to escape local land-use/zoning laws to mine sand⁴; and 5) U.S. Rail should be required to establish that it will not transport construction and debris materials.⁵

In a letter dated April 29, 2008, U.S. Rail responded to the City's filing making the following points: 1) a waiver of the six-month prefilng requirement is appropriate and a matter of long standing policy;⁶ 2) given this stage of the environmental review process, all potential environmental impacts have been as completely described as possible; 3) New York State environmental laws are preempted or are inapplicable; 4) U.S. Rail has made full disclosure of all relevant facts regarding construction of the BRT including all ancillary excavation operations; and 5) U.S. Rail is not seeking solid waste transfer operating authority.

SEA acknowledges the concerns raised by the City. However, SEA believes that it is inappropriate, at this time, to address those concerns. SEA has reviewed the record and believes that U.S. Rail has satisfied the criteria outlined at 49 C.F.R. 1105.10 (c) for a waiver of the six-month prefilng requirement. Moreover, SEA notes that once the environmental review process is underway, the City will have several opportunities to be heard and to fully air its concerns. Therefore, SEA denies the City's request to deny U.S. Rail's request for a waiver from the six-month prefilng requirement.

U.S. Rail, an existing Class III short line rail carrier, presently conducts rail operations under the name of the Greater Miami & Scioto Railroad in the State of Ohio. U.S. Rail has leased the BRT site from Sills Road and proposes to construct and operate the facility as a Class II railroad. U.S. Rail would connect with the NY&A, an existing Class III rail carrier that currently provides freight service over the lines of the Long Island Railroad.

I understand that the Memorandum of Understanding (MOU) is close to completion. When the MOU has been finalized and signed by all parties, SEA can then initiate consultation with the appropriate Federal, state, and local agencies and schedule a site inspection with our third-party consultant, Gannett Fleming, Inc. It is only after SEA has completed its site inspection and agency

⁴ The City references among other documents, an Excavation Agreement with Adjo Contracting Corp., a partner of Sills Road.

⁵ In a letter to the Board dated January 25, 2006, U.S. Rail, in the New England Transrail case, states that it "generates a large parts of its revenue from hauling solid waste materials" and further states that its research indicates that solid waste in the Northeast region of the United States is that region's major outbound component for export.

⁶ In referencing the March 17, 2008, meeting with SEA, U.S. Rail incorrectly states that consensus had been reached regarding the preparation of an EA vs. an EIS. In a letter dated May 1, 2008, SEA responded that no determination with regard to the preparation of either an EA or EIS would be made until after the completion of several steps culminating with a site visit.

consultation that it will be in a position to verify the information set forth in your waiver request and determine whether it is appropriate to waive the requirement that an EIS be prepared for this proposed rail line construction project.

As this project moves forward, you can be assured that SEA will act as quickly as possible so long as the integrity of the environmental review process is not jeopardized

If we can be of further assistance, please do not hesitate to contact me or Troy Brady of my staff at (610) 793-4301.

Sincerely,

Victoria Rutson
Chief, Section of Environmental Analysis

Enclosure